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No. 92-371

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In the Supreme Court of the United States

OCTOBER TERM, 1992

REAL PROPERTY AND PREMISES KNOWN AS 4408 HILLSIDE COURT, ALEXANDRIA, VIRGINIA 22306 AND SHARON JARRELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in striking an affidavit submitted by petitioner Jarrell in opposition to summary judgment in a civil forfeiture action on the ground that she had previously asserted a Fifth Amendment privilege to avoid being deposed by the government in that action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the court's decision is noted at 966 F.2d 1445 (Table). The decision of the district court (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1992. The petition for a writ of certiorari was filed on August 31, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner property is a residence owned (before its forfeiture) by petitioner Sharon Jarrell. During 1986 and 1987, various drug offenses, including sales of cocaine, originated from or were directly connected to the residence. Pet. App. A3-A4. In 1991, local police executed a search warrant for the residence and discovered a cocaine grinder bearing Jarrell's fingerprints, a purse containing one ounce of cocaine, papers with the names of individuals and corresponding amounts (apparently "owe sheets" related to drug transactions), and a scale. Miguel Langebeck, Jarrell's former husband, who lived at the residence, was arrested at the time of the search on charges of possessing and distributing drugs. *Ibid.*

Petitioner Jarrell was interviewed several times between February and May, 1991, by Police Detective David Crank. According to Crank, petitioner made significant incriminating statements during those interviews. In addition, the police received a number of statements from other individuals involved in the drug trade to the effect that petitioners Jarrell and the residence were both intimately involved in narcotics activity. Pet. App. A4.

2. On April 24, 1991, the government filed a complaint for forfeiture of the residence pursuant to 21 U.S.C. 881(a)(7), alleging that the property had been used to facilitate the commission of felony narcotics violations. Most of the evidence establishing probable cause that the property had been used to facilitate drug transactions was contained in an affidavit of Detective Crank and its attachments. C.A. App. 52-62. That affidavit related numerous instances of drug activity connected with the property, and numerous admissions by petitioner Jarrell

that she was aware that the residence was being used for drug trafficking. See *id.* at 54-55.

On April 25, 1991, the State of Virginia charged petitioner Jarrell with possession (with intent to distribute) of the ounce of cocaine found in the purse seized from her residence during the search. Pet. App. A2. The federal forfeiture complaint mentioned that ounce of cocaine only in passing (C.A. App. 9-10, ¶¶ 22, 25), did not allege that it belonged to petitioner or that she intended to distribute it, and did not rely on its possession or intended distribution in establishing probable cause for the forfeiture. The forfeiture complaint instead alleged actual sales of cocaine at the residence by petitioner and others. See Gov't C.A. Br. 17 n.3.

Petitioner Jarrell filed a claim opposing forfeiture under the provision of Section 881(a)(7) that precludes forfeiture if the acts otherwise justifying it were committed "without the knowledge or consent" of the property owner. The government noticed petitioner's deposition for July 25, 1991. Petitioner declined to appear, however, asserting "her Fifth Amendment right not to incriminate herself with respect to any questions involving the possession or distribution of cocaine" or knowledge of any such activity. Pet. App. A2-A3; C.A. App. 21. Neither at that time nor at any time before the close of discovery did petitioner request that the district court fashion a means by which she might be deposed and yet be protected from having her testimony used against her in a criminal proceeding, suggest to the court or to counsel for the government that she would be willing to be deposed under certain circumstances, or seek or suggest any other kind of "accommodation" between her Fifth Amendment privilege and the government's need for

civil discovery. See Pet. App. A7-A8; Gov't C.A. Br. 21-22.

On August 9, 1991, at the close of the time prescribed for discovery, the government filed a motion for summary judgment. C.A. App. 25-61. The motion was supported by the affidavit of Detective Crank, stating that petitioner Jarrell had made a variety of admissions regarding her knowledge of drug sales and the use of her premises for that purpose. Petitioner did not dispute that the government had established probable cause to believe that her property had been used to facilitate felony drug offenses, and thus was subject to forfeiture. See, *e.g.*, Pet. App. B5. In support of her "innocent owner" defense petitioner did, however, file affidavits denying her knowledge of any such activities and denying that she had made prior statements to the contrary. The government moved to strike Jarrell's affidavits on the ground that she had previously refused to be deposed. *Id.* at A3.

After a hearing held on August 30, 1991, the district court granted the government's motion to strike and its motion for summary judgment. The court ruled that petitioner Jarrell could not file an affidavit attempting to create triable issues of fact when she had refused to be deposed, and that without her affidavits the government was entitled to summary judgment. Pet. App. A3, B8. The court refused the request, made by petitioner's counsel for the first time at the hearing, that the court use its discretion to seek an accommodation between petitioner's Fifth Amendment privilege and the needs of the civil proceeding. *Id.* at B3-B4, B8.

3. The court of appeals affirmed. The court ruled that even if petitioner Jarrell was forced to choose between risking incrimination by participating in the civil discovery process or risking a loss in the civil

case by remaining silent, that choice did not amount to the sort of governmental compulsion prohibited by the Fifth Amendment.[1] Pet. App. A6-A7. Petitioner could not use the Fifth Amendment "as a shield to oppose depositions while discarding it for the limited purpose of making statements to support" her claim. *Id.* at A7 (quoting *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991)).

The court of appeals rejected (Pet. App. A7-A8) petitioner's claim that the district court erred by denying her request that it fashion some accommodation of her Fifth Amendment rights. In the court of appeals, petitioner argued that the district court could have made such an accommodation either by staying the forfeiture proceeding until after the conclusion of the state criminal case, or by immunizing petitioner from criminal liability for any statement she might make in the civil forfeiture proceeding. Pet. App. A5; Pet. C.A. Br. 21-29. The court observed (Pet. App. A7-A8) that petitioner had failed during the four-month discovery period to seek any delay, protective order, or other accommodation from either the government or the district court. Although it noted that under appropriate circumstances a district court might have a responsibility to seek such an accommodation, it held that "the district

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[1] The court expressed some doubt as to whether petitioner's deposition testimony would actually have implicated her Fifth Amendment rights. "In fact, the limited nature of her alleged criminal offense, and the lack of a direct connection between that offense and an assertion that the premises were being used in ongoing drug activity, would have allowed Jarrell to testify on deposition as to perhaps the entire factual basis for the government's forfeiture action without making any incriminating statement about her own alleged criminal activity." Pet. App. A6 n.5.

court's failure here sua sponte to impose such an accommodation cannot be seen as reversible error when no accommodation was proposed at the relevant time by the complaining party."

ARGUMENT

Under the particular circumstances of this case, the district court's order to strike petitioner Jarrell's affidavits did not impose any impermissible burden on her Fifth Amendment rights. Under this Court's decisions, we believe it is questionable whether a district court hearing a civil forfeiture action is ever under a constitutional obligation to "accommodate" Fifth Amendment concerns that a claimant may have with respect to separate criminal pro-ceedings, other than by respecting the claimant's choice to remain silent where a Fifth Amendment privilege is properly invoked. In this case, however, the court of appeals correctly held that whatever the claimant's rights when a request for accommodation is presented to the district court in a timely fashion, the court is not obliged to seek such an accommodation *sua sponte*, nor to entertain requests made for the first time after the end of an ample discovery period and only in response to the government's motion for summary judgment. The court of appeals did not reach any broader issue on the facts of this case, and that court's decision does not warrant further review.

1. This case involves a civil proceeding in which the claimant bore the burden of producing evidence to rebut the government's initial showing of probable cause that her property was subject to forfeiture. The claimant sought to bear that burden by filing an affidavit, but deflected the government's attempt to depose and cross-examine her with respect to the matters addressed in her affidavit and other relevant

facts, on the ground that such normal civil discovery would violate her Fifth Amendment rights.

These facts are directly analogous to those considered by this Court in *United States* v. *Rylander*, 460 U.S. 752 (1983). *Rylander* involved a taxpayer who was tried for civil contempt for failing to respond to a subpoena for documents. In his defense, Rylander submitted an affidavit in which he claimed that he did not possess the records sought by the subpoena, and had not disposed of them to other persons. When the government sought to cross-examine him on these claims, Rylander asserted a Fifth Amendment privilege and refused. The district court thereupon disregarded Rylander's affidavit, and held him in contempt. *Id.* at 754-755. The court of appeals reversed, holding that the trial court had impermissibly burdened Rylander's Fifth Amendment privilege by requiring him to choose between waiving the privilege in order to submit his statement in the civil contempt proceeding, and invoking the privilege and having his statement excluded. *Id.* at 755-756.

This Court held that the district court was "entirely justified" in rejecting Rylander's affidavit. 460 U.S. at 758. "This was a time for testimony, and Rylander's *ex parte* affidavit and uncross-examined testimony were properly disregarded." *Ibid.* The Court noted that its cases had "squarely rejected" the argument that "a possible failure of proof on an issue where the defendant ha[s] the burden of proof is a form of 'compulsion' " that violates the Fifth Amendment. *Ibid.* Indeed, "such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Id.* at 759 (emphasis omitted) (quoting *Williams* v. *Florida*, 399 U.S. 78, 83 (1970)). Cf. *Baxter* v. *Palmigiano*, 425

U.S. 308, 318 (1976) (Fifth Amendment does not forbid drawing adverse inference from party's silence where privilege is asserted in a civil case). The Court refused to "convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." 460 U.S. at 758.

We think it clear under *Rylander* that, given petitioner Jarrell's refusal to be deposed, the district court imposed no unacceptable burden on her rights by striking her affidavit, recognizing her failure to sustain her burden of proof on an affirmative defense to the forfeiture action, and granting summary judgment to the government. Indeed, petitioner appears to recognize the strength of the government's interests, and couches her argument (Pet. 9-17) in terms of a request that the courts merely seek some "accommodation" between the government's right to discovery and petitioner's interest in avoiding the choice between adducing evidence necessary to the civil action and claiming a Fifth Amendment privilege. Under *Rylander*, however, we think it open to serious question whether a trial court ever has a constitutional duty to seek any such "accommodation."[2]

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[2] Petitioner attempts to distinguish *Rylander* (Pet. 19) on the ground that no "parallel" criminal proceeding was involved there. But the existence of an actual pending criminal proceeding is irrelevant to the exercise of a Fifth Amendment privilege; all that is required is a realistic threat of future prosecution. See, *e.g.*, *United States* v. *U.S. Currency*, 626 F.2d 11, 14 (6th Cir. 1980). Moreover, this court has held in a comparable civil seizure context that the Food and Drug Administration need not "invariably choose either to forgo

The court of appeals cases cited by petitioners for the proposition that such accommodation is required were decided prior to *Rylander*, and were premised on an interpretation of the Fifth Amendment privilege that *Rylander* explicitly rejected. See *United States* v. *U.S. Currency*, 626 F.2d 11 (6th Cir. 1980); *Wehling* v. *Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979); *Shaffer* v. *United States*, 528 F.2d 920 (4th Cir. 1975).[3] In *In re Edmond*, *supra*, in contrast, the court followed *Rylander* to uphold a district court's rejection of an affidavit filed by a party who invoked his Fifth Amendment privilege to refuse to be deposed. Petitioner has cited no case since *Rylander* that would constitutionally require accommodation of her desire to invoke the Fifth Amendment privilege under the circumstances of this case.[4]

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recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *United States* v. *Kordel*, 397 U.S. 1, 11 (1970). Indeed, the potential need to wait until the statute of limitations has run on every potentially implicated state and federal crime before continuing with discovery is one reason that petitioner Jarrell's suggestion that the district court "accommodate" her rights by staying the forfeiture action is impractical. See Gov't C.A. Br. 25-28; compare *Pacers, Inc.* v. *Superior Court*, 208 Cal. Rptr. 743, 746 (Ct. App. 1984) (staying civil action for 4 1/2 years from the date of suit in order to allow criminal statute to run on defendants' conduct).

[3] Petitioners also cite *Pacers, Inc.* v. *Superior Court*, *supra*. The *Pacers* court relied on older federal cases, but did not cite or discuss *Rylander*. It appears to be inconsistent with *Rylander*, and must in any event be read in light of this Court's decision in that case.

[4] In *Afro-Lecon, Inc.* v. *United States*, 820 F.2d 1198, 1202 (1987), the Federal Circuit did distinguish *Rylander*, in part on the unpersuasive ground that it did not involve parallel civil and criminal proceedings, and in part because the court thought that the government was less prejudiced where, as in

2. Regardless of what accommodation a district court might be required, constitutionally or prudentially, to attempt if requested to do so by a party in a timely fashion, the court of appeals was in any event correct that no accommodation was required on the facts of this case. To begin with, as the court of appeals noted, it is not clear why petitioner's deposition in this case would have involved any significant testimony related to the limited state court charge against her. Pet. App. A6 n.5; see note 1, *supra*. Even assuming, however, as did both the government and the courts below, that petitioner was within her rights in choosing not to answer any deposition questions in this case, and that she had a further "right" to request the district court to fashion some "accommodation" that would allow her to make that choice without forgoing her chance to establish an innocent owner defense to forfeiture, she was

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Afro-Lecon, the party seeking to assert the privilege sought only a delay in its own civil action seeking monetary recovery from the government. The latter distinction is not, of course, available in this case, where the government has a significant interest in proceeding expeditiously with its forfeiture action. Moreover, the court of appeals made clear that the trial court was not constitutionally required to grant a stay or other relief to a civil litigant claiming an imposition on his Fifth Amendment rights; at most, the matter was one for the sound discretion of the trial court, on proper application and after consideration of the relative burdens on the parties. *Id.* at 1202-1206. See also *United States* v. *Parcels of Land*, 903 F.2d 36 (1st Cir.) (suggesting that the First Circuit has required district courts to attempt some accommodation, but leaving broad discretion to the trial court, and citing *Rylander* to support the proposition that in any event no more than imperfect accommodation would be constitutionally required), cert. denied, 111 S. Ct. 289 (1990).

nonetheless required to present that request to the district court in a timely fashion.

The court of appeals properly found that petitioner bypassed the possibility of an "accommodation" by not seeking it at the proper time. Instead, "during the four month discovery period provided, Jarrell sought no delay, protective order, or other accommodation from the government or the district court." Pet. App. A8. Nor did she suggest, to the government or to the court, that she might under some circumstances be willing to be deposed. During that same discovery period, on the other hand, petitioner deposed Detective Crank and examined all the documents relevant to the government's case; her affidavits, proffered after the close of discovery and after review of the government's motion for summary judgment, were obviously tailored to refute the government's specific allegations. See Gov't C.A. Br. 23. The court of appeals was clearly correct that petitioner's "failure to state the proposed need for accommodation of her Fifth Amendment rights earlier failed to provide the district court with an opportunity to balance those rights with the rights of the government as her opponent." Pet. App. A8.[5]

Petitioner could not have been surprised by the tenor of the government's motion for summary judgment, filed at the close of the discovery period, or by the fact that she would eventually be required to come forward with more than silence if she wished to establish a defense to forfeiture. On these facts, the

[5] The court went so far as to suggest that petitioner's assertion of a need for accommodation only at the time she sought to admit her affidavits suggested "that the motive for her timing * * * may have been the attaining of an unfair discovery advantage, and not, as she asserts, the promotion of her constitutional rights." Pet. App. A8.

court of appeals correctly held (Pet. App. A8) that the district court was well within its discretion when it refused to accommodate petitioner's "last-minute backpedaling on [her] longstanding refusal to be deposed." *United States* v. *Parcels of Land*, 903 F.2d 36, 45 (1st Cir.), cert. denied, 111 S. Ct. 289 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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